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2010, Article / Letter to editor (Review of International Political Economy, 17, 1, (2010), pp. 20-44)

Doi link to publisher: https://doi.org/10.1080/09692290903014927

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On: *1 March 2010*
Access details: *Access Details: [subscription number 912931896]*
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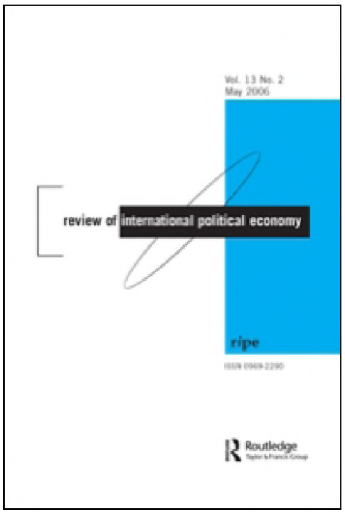

Review of International Political Economy
Publication details, including instructions for authors and subscription information:
http://www.informaworld.com/smpp/title~content=t713393878

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Online publication date: 01 March 2010

To cite this Article Buch-Hansen, Hubert and Wigger, Angela(2010) 'Revisiting 50 years of market-making: The neoliberal transformation of European competition policy', Review of International Political Economy, 17: 1, 20 — 44
To link to this Article: DOI: 10.1080/09692290903014927
URL: http://dx.doi.org/10.1080/09692290903014927

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Review of International Political Economy 17:1 February 2010: 20–44

Routledge
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Revisiting 50 years of market-making: The neoliberal transformation of European competition policy

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ABSTRACT

The article analyses the evolution of European competition policy. It is argued that the content, form, and scope of competition regulation has undergone a major transformation over the past fifty years, which is related to broader socio-economic developments. Until the mid-1980s, competition policy formed part of the institutional nexus of the postwar order of 'embedded liberalism', underpinned by a Fordist accumulation regime and Keynesian welfare institutions. It exemplified strong neo-mercantilist and protectionist traits, allowing for significant distortions of competition, whenever justified for general reasons of industrial and social policy. Since the mid-1980s, gradually, a neoliberal 'competition only' vision came to dominate, giving rise to a more market-based competition regime, in which private rather than public actors prevail, and which seeks to create an ever-bigger 'level playing field' of free markets. This transformation is linked to the broader context of the disruption of the postwar social order and the rise of neoliberalism. A public–private alliance of transnational actors, consisting of the European Commission's DG Competition and transnational business elite networks, were the driving forces behind the 'neoliberalisation' of competition policy.

KEYWORDS

Capitalism; competition; competition policy; regulatory discourses; embedded liberalism; neoliberalism.

An open, competitive Single Market is Europe's biggest asset, unique in the world. Competition policy and effective enforcement will

Review of International Political Economy
ISSN 0969-2290 print/ISSN 1466-4526 online © 2010 Taylor & Francis
http://www.informaworld.com
DOI: 10.1080/09692290903014927

> secure a level playing field – so all operators in the Single Market compete and win on merit alone. This is what generates investment, efficiency, and innovation. (Neelie Kroes, EU Competition Commissioner, 2006)

INTRODUCTION

According to prevailing wisdom, which draws on the premises of contemporary neoclassical economic theories, fierce competition is a blessing. It is considered self-evident that the dynamic of the competitive process leads to higher levels of productive efficiency and technological innovation, which in turn result in the maximization of social welfare. As one scholar observes, 'in the realms of European discourses and institutions alike, competition has been elevated to an exalted status, a "highest good" that brings all other virtues, including international economic competitiveness' (Smith, 2005: 316). It is also widely accepted that competition cannot be taken for granted. For this reason, competition policies evolved in industrialized states. In Europe, competition is regulated by both national competition authorities (NCAs) and EU institutions. Competition policy constitutes one of the EU's core policy areas, in which the Commission's Directorate General IV (today called DG Competition) has enjoyed far-reaching enforcement powers since the 1960s. EC competition policy, however, only achieved heightened prominence with the relaunch of the Single Market Program in the 1980s. Its importance was further reinforced in the wake of the 2000 Lisbon agenda, aiming at making the EU 'the most competitive and knowledge-based economy of the world by 2010'.

Focusing particularly on EC level developments, this article analyzes the broader evolution of European competition regulation over the past 50 years. It demonstrates that a profound transformation of the *content*, *form*, and *scope* of competition regulation in Europe has taken place: in terms of content, enforcement practices have been restricted to a 'competition only' focus; in terms of form, they have become increasingly privatized and undemocratic; and in terms of scope, they have been Europeanized and globalized. The article argues that this transformation needs to be understood in the context of the transnationalization of capitalism, and the broader shift from embedded liberalism towards neoliberalism.

The article is divided into five sections. The first section offers a theoretical perspective for analyzing broader developments in the field of competition policy. The second and fourth sections outline the broader historical context in which European competition policy developed, dealing with the era of embedded liberalism and the era of neoliberalism. The third and fifth sections explore the content, form and scope of competition policy in Europe in these two eras. A conclusion summarizes the

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findings, and reflects upon the wider impacts of the transformation of EC competition policy.

THEORIZING COMPETITION REGULATION

The theoretical perspective outlined here seeks to break with two tendencies in the existing literature on competition policy, which are engrained not only in the contributions from the economic and legal sciences dominating the field, but also in the relatively few political science analyses that surfaced since the mid-1990s. First, competition policy is often analyzed as if it did not form part of a broader whole of which it is affected by, and on which it has an impact. The bulk of the contributions from the economic and legal sciences focuses on detailed economic and legal themes, providing a narrow and self-contained perspective on competition regulation (e.g. Faull and Nikpay, 2007). Contributions from the field of political science, in turn, largely tend to focus on institutional and regulatory questions. Although it is important to generate knowledge on the institutional, economic, and judicial dimensions of this policy area, such knowledge does not help to understand broader developments in competition policy, as it fails to embed the latter in the context of the broader transformation of capitalism and regulation in Europe.

Second, most of the existing literature adopts what Cox (1981) coined 'a problem-solving attitude', neither questioning 'the existing order of things', nor challenging prevailing discourses against the background of which competition policy is formulated. Accepting competition as a blessing implies that the negative consequences of competition remain unmentioned. Furthermore, the use of seemingly apolitical and static conceptualizations of anticompetitive conduct, and the preoccupation with complex legal technicalities, often conceals the profoundly political nature of competition policy. Exemplary of this tendency is Motta (2004: 30), who defines competition policy as 'a set of policies and laws ensuring that competition in the marketplace is not restricted in such a way as to reduce economic welfare', or, Damro (2006: 867), who notes that competition policy is 'designed to ensure and manage competition, which helps to determine opportunities and incentives for consumers and producers'. Similarly, those enforcing EC competition law often downplay the inherent political nature of competition policy. Former Competition Commissioner Monti repeatedly stated that competition policy was 'a matter of law and economics, not politics' (European Union, 2001).

In marked contrast, the perspective advocated here insists that competition policy is deeply political and needs to be understood in a broader context, most notably that of capitalism and its various manifestations. Capitalism can be defined as an economic system in which a large number of companies, using privately owned capital goods and wage-labor, produce

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and sell goods and services with the intention of making profit (Jessop, 2002a: 12). The prevalent logic is that of capital accumulation, with 'capital' denoting accumulated wealth that can be used to accumulate more wealth. The process of capital accumulation is not unproblematic, but pervaded by a range of contradictions (ibid: 20–1). One of these contradictions arises from the dynamics of competition, comprising the process of economic rivalry between companies in their struggle for profits. Competition, as one of the central driving forces of capitalism, is widely considered to have a number of desirable effects, such as providing firms with an incentive to innovate and cut prices, and hereby benefit consumers (Eekhoff and Mock, 2004). Competition, however, can only 'deliver' this, because it confronts companies as an objective threat, which, in its strongest form, 'strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives' (Schumpeter, 1947: 84). Individual firms generally prefer to avoid the 'feverish agitation' of price and product rivalry by engaging in various forms of collusive arrangements and/or economic concentrations (Marx, 1906: Part III, Chapter 10, Section 5). In its most extreme form, the latter results in the oligopolization or monopolization of product markets, which undermines the competitive process. Wanniski (1992: 18) captured this contradiction well by noting that 'Marx was extremely close to the truth' when he discovered that '[c]apitalism could not succeed because capitalists would sow the seeds of their own destruction. That is, if capitalism *requires* relentless competition, yet capitalists are doing everything they can to *destroy* competition, we have a system that is inherently unsustainable'. This, and other contradictions, explains why capitalism's expanded reproduction cannot be secured by markets and market actors alone. Indeed, markets are not natural facts that represent some sort of God-given order that existed prior to, and despite of, various extra-economic interferences, but rather are social constructs that depend on various forms of regulation for their reproduction (Van Apeldoorn and Horn, 2007: 211–5). The very existence of such regulation entails a disclaimer with respect to the workings of unrestricted free-market logics. Thus, the role of the state in regulating competition is central.

Following regulation theorists, specific forms of capitalism can be interpreted in terms of an *accumulation regime*, that is, 'a complementary pattern of production and consumption which is reproducible over a long period', and a *mode of regulation*, understood as 'an emergent ensemble of rules, norms, patterns of conduct, social networks, organisational forms and institutions which can stabilize an accumulation regime' (Jessop and Sum, 2006: 42; see also Boyer, 1990: 43). Competition regulation constitutes a contingent element in a wider mode of regulation that *inter alia* seeks to remedy the abovementioned contradiction, hereby contributing to make markets work. To put it in metaphorical terms: if the process of competition is the

engine of capitalism, competition regulation is the lubricating oil that assures the functioning of the engine. Competition regulation is contingent, as its *content*, *form*, and *scope* can vary greatly. Regarding *content*, it can have various 'objects of regulation', such as cartels, market dominance, mergers, or, state aid, and, in regulating these objects, serve different social purposes, thereby benefiting certain societal groups more than others. Regarding *form*, competition policies can be enforced by politically independent competition authorities, involve political decision-makers, or, be left to private market actors litigating before the courts, generally referred to as private enforcement. Finally, the question of *scope* concerns the demarcation of the spatial jurisdictional reach of competition policies: it can be national, regional, or global.

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The content, form, and scope of a competition policy are, first, related to the way in which capital accumulation is facilitated in the broader mode of regulation at a particular historical juncture and location, and, second, affected by socioeconomic power balances. Even though any mode of regulation contains a number of 'irrelevant, residual, marginal, secondary, and even potentially contradictory elements' (Jessop, 2002b: 106), the developments in the wider regulation of capitalism are likely to be reflected in the regulation of competition. Due to the contradictory and dynamic nature of capitalism, a mode of regulation can only achieve temporary success: over time, capital accumulation and its facilitation require a gradual transformation, or, replacement of the various elements making up the existing mode of regulation. Rather than automatic responses to the 'needs of capitalism', modes of regulation are shaped within 'determinate limits through indeterminate political and social struggles' (Hudson, 2005: 100; see also Lipietz, 1992: 7–8). Such struggles are informed by ideas that may, or, may not, become institutionalized. Competition policy, like other forms of regulation, is based on particular ideas on how to organize a market place – and these ideas, albeit imperfectly, are related to broader discourses that prevail as a result of an underlying balance of power between various socioeconomic forces at a given juncture.

Two levels of 'ideas of regulation' can thus be distinguished, namely, *general discourses* and *policy-area-specific discourses*. General discourses entail more encompassing perspectives on how the economy in a given social space ought to be regulated, and relate to the overall nature of regulation by prescribing particular 'models' of capitalism. Policy-area-specific discourses emerge from general discourses, and translate them into perspectives on regulation in various policy areas. Regarding competition policy, they entail perspectives on its purpose (content), how it should be enforced (form), and what its jurisdictional reach should be (scope). The significance of such discourses changes over time, corresponding to the shifting constellations of socioeconomic forces formulating their preferences and positions based on competing discourses. Such a transition

never entails a total rupture of previous structures at once, but is shaped by 'the paradoxical simultaneity of continuity/discontinuity in the flow of historical time' (Jessop and Sum, 2006: 324). In a situation of relative continuity, regulatory changes are in line with the structural coherence of a given period. Once regulatory changes disrupt this coherence, a phase of transition begins, in which relative continuity alternates with relative discontinuity (ibid). Such transitions are 'moments of disjunction and relative openness' in which different socioeconomic forces search for new patterns of structural coherence in an experimental way (ibid: 326). This struggle for hegemony proceeds through moments of deconstruction, construction, and consolidation (Overbeek, 1999: 248–9). In the deconstructive moment, articulators of a new discourse problematize prevalent ideas and promote new ones. Once a vast majority of a constituency subscribes to these ideas, a constructive moment follows, in which the discourse gets implemented in social practices and structural adjustments. The moment of consolidation is marked again by relative continuity: the discourse becomes commonsensical and deeply engrained in institutions and regulatory ensembles. The hegemony of a policy-area-specific discourse with a particular content, form, and scope is likely to be related to the broader hegemony of the general discourse of regulation from which it emanated.

Various socioeconomic forces and their underlying power relationship can be of importance in the context of competition policy: consumers, unions, competition authorities, and political decision-makers. Particular weight can be given to those directly subject to regulation, most notably 'capital actors' representing corporate viewpoints and seeking political alignment with regulators (Chari and Kritzinger, 2006: 54–6). Capital actors are not a unified group with a common interest in one particular type of competition policy. Representatives of import- or export-orientated companies, small and medium-sized enterprises (SMEs), or, transnational corporations (TNCs) often have contradicting preferences. To use another metaphor: competition forces market players to swim or to sink, and competition takes place between swimmers. Those on the winning side share an interest in the right to compete freely, undisturbed by state interferences and privately erected market barriers. The power relationship between different types of capital actors changes over time in dialectical interplays with the transformation of capitalism, and this, in turn, has an impact on their relative ability to influence what type of competition regulation they are subjected to.

The tendency of downplaying the political nature of competition policy, as it is the case in the overwhelming majority of the literature, should thus be rejected. Political authorities do not automatically crystallize the 'best' and most effective institutional and regulatory solutions. Behind seemingly detailed judicial and technocratic issues of competition laws and their enforcement lurk important political questions regarding the

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distribution and concentration of economic power and wealth, not only in domestic market situations, but also in an ever-more globalized world. Conceptions of competition policy denying or neglecting this are political themselves as they disguise the underlying conflicting interests regarding the content, form, and scope of public intervention in competition matters.

THE ERA OF EMBEDDED LIBERALISM

The era of embedded liberalism embraces the post-war economic order lasting from the 1950s to the 1970s in the advanced industrialized states of the West, including the EC member states (cf. Ruggie, 1982). This order was characterized by Fordism at the level of the organization of economic production, Keynesian-inspired macroeconomic and social policies at the level of society and state, and the *Pax Americana* at the level of the overall organization of the capitalist world system (Overbeek, 1990: 87). The Fordist accumulation regime coupled the rising productivity levels of nationally oriented companies with mass consumption (Van Apeldoorn, 2002: 52). Keynesian-inspired welfare states with domestic regimes of government-steered market intervention constituted a crucial element in the mode(s) of regulation that sought to stabilize Fordist growth. These welfare states did not emerge *in order* to make Fordism function, but were the contingent outcome of political struggles, in which organized labor demanded higher wages and social security rights, and, in which political and corporate elites sought to minimize working class support for communism (Lipietz, 1992: 5–8). At international level, the elimination of trade barriers of the General Agreement of Trade and Tariffs (GATT) in the late 1950s and early 1960s, supported by the Bretton Woods system of stable exchange rates, sustained the enhanced openness of national markets to foreign trade. As a common denominator, embedded liberalism exhibited a broad-based commitment to an open world economy combined with domestic mixed economies. To borrow the expression by Gilpin (1987: 355), it allowed for 'Keynes at home and Smith abroad'.

The EC as a supranational organization was intended to stabilize the processes of predominantly nationally oriented capital accumulation on a pan-European scale, and formed a political response to the challenges posed by the much stronger US market. By gradually opening national markets, EC member governments sought to overcome the fragmentation of the European marketplace along national borders and establish analogous market conditions to that of the US. European regulators hoped that companies from the different member states would engage in cross-border mergers and acquisitions (M&As), reap the benefits of economies of scale, and, hence, become large enough to be competitive *vis-à-vis* US companies. As Hallstein, the Commission's first President, noted, the goal of 'the transformation of the market relations in the European Community as a

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whole was to build a new giant big enough in a world of giant powers' (in Freyer, 2006: 282).

This vision was reinforced in the course of the 1960s, when the competitive strength of US companies became a major concern to economic and political elites in Europe. The establishment of the customs union through the 'Common External Tariff', and the joint foreign trade policy on 1 July 1968, raised the awareness of expansion-orientated, capital intensive US business, who had a strong interest in the creation of free-market access for their technologically more advanced US companies in the market for high-value goods. In the course of the 1960s, US companies sought to gain a foothold in the common market through M&As with European companies, and the conclusion of different forms of cooperative intercompany arrangements, such as alliances, joint ventures, distribution and supplier agreements, cross licensing of intellectual property, and franchizing. As a result, in the 1960s, 27 of the 30 largest industrial companies worldwide originated from the US, and generated most of their profits in Europe (Adams and Brock, 1990: 175).

The enhanced US corporate presence evoked the picture of a growing submergence of corporate Europe to US economic hegemony. In France, the corporate and political elite particularly feared that 'US transnationals would be a Trojan horse undermining French economic sovereignty' (Gill and Law, 1989: 485). These fears were echoed in Servan-Schreiber's best-selling book *Le defi américain* (*The American Challenge*), where he argued that Europe was the target of an offensive industrial invasion and risked becoming 'an annex of the United States' (1968: 139). One of the problems he identified was that many European companies were too small compared to their larger US counterparts. Even though the common market was created with the intention to allow sufficiently large (nationally based) corporations to profit from the opportunities for economies of scale and scope, the institutional landscape of different regulatory regimes and cultural-linguistic barriers imposed structural constraints to expand across borders. Concentrations of a truly European dimension were relatively seldom (Commission, 1970: 92).

The structural features of embedded liberalism generated a period of exceptional expansion of the world economy, which was later referred as the 'Golden Age' (Hobsbawm, 1994: 258–61). From the 1960s to the early 1970s, the world's manufacturing output doubled and trade trebled (Overbeek and Van der Pijl, 1993: 5). For various economic, political, and social reasons, however, the Golden Age ended in 1973 (Lipietz, 1992: 14–9). A deep economic crisis began, lasting well into the next decade, and manifesting in sharp decreases in output, productivity, export growth, and increasing unemployment, and inflation in industrial states (Frieden, 2006: 363–91). EC member states initially responded to the crisis by intensifying the features of the Keynesian welfare state (Jessop, 2002a: 90). The aspiration to

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seriously tackle the 'American challenge' at EC level was put in cold storage, and primarily taken up along national lines by far-reaching national industrial policies meant to cushion national industries against the presumed competitive pressures of US companies (Van der Pijl, 1984: 246–7). Member governments gave primacy to the creation of national champions, and boosting industries considered 'strategic', both in the private and public sector. This 'new protectionism' involved direct state aids, guaranteed preferential public procurement contracts, tax rebates for some industries, and the stimulation of national mergers (Commission, 1972: 16).

COMPETITION POLICY IN THE ERA OF EMBEDDED LIBERALISM

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Competition laws at both national and EC level were adopted in the era of embedded liberalism. The competition provisions in the 1951 European Coal and Steel Community (ECSC) Treaty took shape against the backdrop of strong US presence in the aftermath of the War. Concerned about market access, US government representatives and capital actors feared that without the inclusion of antitrust articles, the ECSC would be 'a clever cover for a gigantic European cartel for coal and steel producers' (Acheson, 1969: 383–4). In the subsequent Treaty of Rome, 'competition' also came to occupy a central position, acquiring a strong constitutional status. In the preamble, member states committed themselves 'to concerted action in order to guarantee a steady expansion, a balanced trade and fair competition'. Moreover, as outlined in Article 2 and 3f, the goal of the EC was to promote 'a high degree of competitiveness', and establish 'a system ensuring that competition in the common market is not distorted'. The actual 'Rules of Competition' addressed cartels and restrictive business practices, abuses of dominant positions, public undertakings, and state aid, stipulated in Article 85 and 86, and 90 to 94, which after the renumbering through the Amsterdam Treaty became Articles 81, 82 and 86 to 89.

The *content*, *form*, and *scope* of competition laws and their enforcement at national and EC level in the period stretching from the late 1950s to the early 1980s appeared as a manifestation of the prevalent social compromise of embedded liberalism. As regards *content*, the laws were framed in general terms, and enforced consistent with the way capital accumulation was facilitated in the Keynesian welfare states. A cursory reading of the competition provisions might give the impression of 'a firm desire to create a neo-classical liberal economic structure based on an approximation as close as possible to the "ideal type" of perfect competition' (Allen, 1983: 212). In fact, the EC competition provisions were due to pressures from the German government, most notably from leading members inspired by ordoliberal ideas (cf. Gerber, 1998). Ordoliberals considered the

proviso of complete competition the centerpiece of an 'ordered' economy, which ideally should be composed to the extent possible of SMEs, and thus, a minimum of 'big business' (ibid: 240–1). However, a closer inspection of the provisions reveals that this view never materialized. Despite the intention to preserve competition, there was no wholehearted commitment to do so at all costs. A range of substantive legal features account for this. First, the absence of merger control is remarkable, particularly as the ECSC Treaty included such provisions. Second, Article 82 did not prohibit significant degrees of market concentration, but allowed dominant positions (including monopolies) as long as there was no 'abuse'. Finally, Article 81(3) provided an opportunity to exempt certain forms of anticompetitive agreements that potentially could fall into the category of a cartel. As McLachlan and Swann (1967: 49) bluntly commented, the Treaty was virtually a *carte-blanche* permitting the creation of market power.

The main reason for this was that the vast majority of capital actors and their governments were not favoring strict EC level competition regulation along ordoliberal lines, as this would have prevented economic concentration and the emergence of 'big business'. As Cini (2002: 247) explains: '[c]oncentration was deemed to be a good thing as it assisted in the process of post-World War II economic reconstruction and helped to make West European industry competitive *vis-à-vis* U.S. big business'. Moreover, in the absence of US government representatives in the preparatory stages, the main driving force behind the relatively strict merger rules of the ECSC Treaty had vanished. Similarly, national competition provisions were designed to ensure the emergence of big (Fordist) companies, even if this undermined competition. Economic concentration was generally considered a catalyst for technological advancement. Consequently, in the 1960s, neither the British nor the German authorities felt a strong need to challenge dominant companies. This tolerant stance was exhibited in many ways: Prime Minister Wilson announced in 1968 to restructure British industries 'on a scale and at a speed not seen in this century' (Adams and Brock, 1990: 177). In France, massive capital infusions and government sponsored mergers in key sectors of global competition (i.e. pharmaceuticals, defense, engineering, and utilities) were meant to reinforce the competitive position of the French industry, a goal that was formally spelled out in the Fifth Plan of the French 'planification' economy of 1966–1970 (Hayward, 1995: 4). Moreover, in the spirit of the Keynesian full employment commitment, in the UK and France, but also to some extent in Germany, competition was regulated on the basis of various 'public interest' criteria, allowing also for employment considerations to be taken into account (cf. Dumez and Jeunemaître, 1996).

Even though the Commission never lost focus on the market integration project in the 1960s and 1970s, it was overtly responsive to the industry

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interests seeking to catch up with the US economy. In line with member state and corporate interests, it gave preferential treatment to certain sectors facing fierce competitive pressures from the US, and later also from Japan. Entrenched with a proactive macroeconomic industrial policy, and fine-tuned to a broad set of socioeconomic objectives, EC competition policy was also primarily shaped by public interest and employment considerations (e.g. Commission, 1972: 12, 17–8). The Commission synthesized the removal of barriers to trade and competition by adopting a pro-concentration stance, and particularly stimulated cross-border alliances to boost commercial interdependencies. The institutional particularities of the EC competition regime facilitated this stance. The *ex ante* notification regime, requiring companies to notify envisaged intercompany agreements to the Commission, reserved a strong role for public market supervision. Based on Article 81(3), the Commission could balance its decision-making between 'good' or 'bad' cartels, and exempt certain conducts from the general cartel prohibition. As stipulated in Regulation 19/65, it could do so either on a case-by-case basis, or categorically exempt entire industries and types of agreements by the issuance of block exemption regulations. This provided companies with a safe-haven procedure, as notified transactions were legally immune from prosecution by third parties. Exemptions, for the sake of making European corporations fit for competition in the world market, offered a welcome avenue to lobby for business-friendly treatments. Moreover, as part of a broader neomercantilist strategy, the Commission sought to thwart the practice in which governments picked their national winners and promoted *Eurochampions* instead. Exemplary is the adoption of Regulation 67 in 1967, which exempted exclusive selling and purchasing agreements, provided that the participating companies belonged to at least two member states. In December 1972, the regulation was prolonged for another ten years by the adoption of Regulation 2591 (Commission, 1973: 19). In addition, spurring technological innovation in the form of intercompany cooperation in the field of R&D as a source of economic growth and competitive strength received central attention (Commission, 1981: 13).

In the crisis years of the 1970s, the liberal 'embeddedness' of competition control engendered the toleration of structural crisis cartels. The Commission exempted intercompany agreements on freezing production of industries suffering from surplus capacity, i.e. the coal and steel, sugar, motor vehicle, shipbuilding, and textile industries (cf. Tsoukalis and Da Silva Ferreira, 1980). Similarly, it tolerated government subsidies meant to rescue industrial sectors in despair, and temporarily increased tariff barriers. As the maintenance of social peace, 'fairness', and equal opportunities had priority, it adopted a supportive strategy towards SMEs, which, based on the *De Minimis* Notice of 1970, were largely excluded from complying with EC laws. In the 1960s and 1970s, more than 90 percent of the

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companies operating in the common market fell under this rule (Bright, 1996: 440–1). In line with the wider neomercantilist strategy to fortify European players in the opening world market, the Commission's enforcement strategy was flexible and lenient, responding to the particular needs of European capital actors.

As regards *scope*, member state and EC competition policies were not integrated or streamlined in the 1960s and 1970s. In the 1960s, EC level enforcement was still in its infancy: Commission officials were inexperienced and the institutional positioning of the Council in the Community structure left the Commission with little scope for a prominent proactive role, despite its far-reaching enforcement powers conveyed by Regulation 17 in 1962, which made it investigator, prosecutor, judge, jury, and executioner in one. As capital accumulation, and its facilitation by various forms of regulation, was primarily a national phenomenon in the embedded liberalism era, neither political nor corporate elites considered the strengthening of supranational competition regulation a viable avenue for curing the economic crisis. This became particularly evident by the Commission's unsuccessful attempts to obtain genuine powers in the merger control area in the early 1970s, which failed due to staunch opposition of capital actors that were oriented towards national markets (Allen, 1983: 106–7). Nonetheless, a long string of Court rulings clarified and expanded the Commission's powers on a case-by-case basis in the 1960s and 1970s (Cini and McGowan, 1998: 29).

As regards *form*, at national level, political decision-makers were often involved in regulatory processes and allowed to overrule NCAs. Cases in point are the merger control regimes of Germany, France, and the UK in the 1970s, which entrusted government ministers with the final say in the regulation of mergers. At EC level, member states did not have formal powers to determine EC competition law enforcement. Nonetheless, particularly during the economic crisis, the Commission was well aware of the fact that it had to proceed cautiously in order not to jeopardize its continued existence. Despite the large-scale tide of restrictive agreements, concentrations, and protectionist national subsidies, the Commission repeatedly ignored significant breaches of EC competition law that risked being politically controversial, and focussed on relatively minor matters instead (Allen, 1983: 232). For instance, horizontal producer cartels, the 'sharp end of competition policy', remained largely untouched until far into the 1970s (Berghahn, 1986: 471).

To recapitulate, the overall content, form, and scope of the competition policies that developed in Europe from the early 1950s to the late 1970s need to be seen in the context of embedded liberalism and its underlying class comprise between industrial capital and organized labor (see Table 1). Significant degrees of economic concentration were allowed, and in some cases even actively promoted through interventionist industrial

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Table 1 Competition policy in the era of embedded liberalism

	Embedded liberalism
Content	• Prevalence of broad 'public interest' criteria (industrial/social policy considerations) • Lenient stance towards cartels and state aids • Neomercantilist active pro-concentration stance • Focus on eliminating intra EC market barriers
Form	• Intervention/participation of political decision-makers in the regulatory practices of competition authorities • Decision-making based on macroeconomics • Strong public market supervision • Primacy of public enforcement
Scope	• Limited integration of national and supranational competition • Regulation • Primacy of the national level

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policies, making the emergence of big Fordist-type firms possible. Moreover, competition policy was designed to take the interests of workers into consideration. Particularly, once the economic crisis set in, competition policies allowed declining companies and industries to engage in 'crisis cartels' and/or receive state aid.

THE NEOLIBERAL TURN

In the late 1970s and early 1980s, the economic crisis was increasingly perceived as a crisis of the embedded liberalism compromise. The combination of the Fordist accumulation regime of mass production methods and the Keynesian welfare states seemed no longer a viable option to increase productivity levels and facilitate capital accumulation. Against this background, many companies expanded into foreign markets to realize further economies of scale, resulting in the transnationalization of production and markets (Lipietz, 1992: 12). When European governments looked for alternative solutions, this provided a window of opportunity for the advocates of neoliberalism. Although neoliberal ideas had been around for quite some time, high level European politicians and corporate elites only started to endorse them in the course of the 1980s, echoing the Reagan Revolution and Thatcherism.

In the 'deconstructive moment' of the ascendancy of neoliberalism as a hegemonic discourse, the market-correcting institutions of the post-war era of European capitalism were fiercely criticized (Van Apeldoorn, 2002: 68). The embedded liberalism era was coined as 'European Disease' and 'Eurosclerosis' (cf. Giersch, 1985), which in addition to referring to the lethargic stupor of European integration in the 1970s, also entailed a

fundamental critique on Keynesian welfare states, selective market intervention, and pro-industrial policies. In its 'constructive moment', neoliberalism translated into various policy-area-specific discourses that gave rise to a series of strategies aiming at transforming different aspects of the existing mode(s) of regulation. In terms of *content*, these strategies sought to disembed capital from a great part of the web of social, political, and regulatory constraints; and in terms of *form*, they targeted at separating key market institutions from democratic accountability (Harvey, 2005: 11, 66). As regards *scope*, the aim was to transnationalize regulation. Together, these strategies sought to stabilize and promote the transition towards a new accumulation regime, sometimes also referred to as 'post-Fordism' (Jessop and Sum, 2006), entailing more flexible production techniques and the transnationalization of production. Importantly, the 'neoliberalization' of the mode(s) of regulation was not a straightforward process, but rather took the shape of an open-ended trial-and-error search for initiatives that could facilitate economic growth, differing from country to country. In its third moment, stretching from the early 1990s to the present, neoliberalism consolidated as the hegemonic general discourse in most parts of the capitalist world.

The disruption of the embedded liberalism compromise and the subsequent neoliberal turn had several causes. Importantly, the underlying power balance between capital and labor shifted decisively in favor of capital, most notably transnational capital. As Van Apeldoorn (2002: 55) puts it, 'the hegemonic project of neo-liberalism can be argued to be about re-establishing the hegemony of capital over labour after, under the previous regime, the growing power of the latter had threatened to undermine capitalist accumulation'. Indeed, the transnationalization of production and detachment of national ownership structures fundamentally changed the regulatory preferences of capital actors involved in cross-border transactions. The increased presence of large European TNCs in global markets enhanced global competition. In response, US-based competitors further diversified their production and expanded around the world, which again triggered similar corporate strategies in Europe. Vested corporate interests, mostly originating from the US, sought to enhance their global competitiveness through the promotion of the deregulation of capital markets, and further trade liberalization. What started in the US, increasingly captured European business elites, who opened a vigorous political campaign at the Commission, requesting the endorsement of neoliberal regulations to open up markets and to free capital investment (Cox and Skidmore-Hess, 1999). During the 1980s, these forces were crucial in ending the European integration paralysis of most of the 1970s and the early 1980s. Most notably, the European Roundtable of Industrialists (ERT), formed in 1983, and consisting of top executives of Europe's largest industrial companies, pushed for a European initiative to halt the economic crisis

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(cf. Cowles, 1998; Van Apeldoorn, 2002). The ERT sought salvation in the completion of the common market, which was considered not half as open as that of the US, and hence, a severe handicap for the development of a prospering economic situation. These corporate requests were successful. From the mid-1980s onwards, the EC's project of creating an 'ever-closer Union', consecrated by the Single European Act (SEA) and the '1992 Program', took shape in an ever-more self-confident and more proactive manner.

> EU competition policy has gradually been transformed into a tool to serve the interests of all those economic, financial, social and political forces which depend on free competition, market liberalisation and state deregulation. (Petrella, 1998: 293)

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THE 'NEOLIBERALIZATION' OF EUROPEAN COMPETITION POLICY

Neither the SEA nor the 1991 Maastricht Treaty introduced substantive changes in the competition policy area. Nonetheless, the broader neoliberal discursive shift had important repercussions on the Commission's enforcement strategies. In its 'deconstructive moment', neoliberalism entailed a critique of the crisis management of the 1970s, most notably the protectionist and interventionist industrial policies of the member states, which were compared by Competition Commissioner Andriessen (1982: 6) to 'woodworms eating away the carcass of the ship of integration'. In the presence of political counter forces, the lenient course in favor of restructuring 'sick' industries, which engendered the preservation of both companies and jobs, did not abruptly end. Rather, state aid and the toleration of structural crisis cartels were increasingly phrased as 'anomalies' leading to a 'frozen economy' (ibid). After a period of transition, and as part of the broader 'constructive moment', the general neoliberal discourse gradually translated into a more specific discourse, revitalizing the enforcement of EC competition regulations.

The ERT emerged as a strong supporter of a competition policy modeled after neoliberal ideas. Next to a broad-based deregulation and rolling back of the public sector by privatization, as well as a flexibilization of labor markets, in a number of publications, it systematically linked free competition to the imperative of generating higher economic growth, prosperity, and competitiveness (*The Financial Times*, 1996: 16). Illustrative is its 1993 *Beating the Crisis* report, which advocated that competition in the Single Market was the best way to develop world players, rather than active government interferences attempting to create 'European Champions' (ERT, 1993: 25). This course was endorsed by the Commission, culminating in a sequence of Competition Commissioners who were staunch proponents

of the neoliberal free-market ideology. What started with the energetic Commissioners Peter Sutherland (1985–1989) and 'Thatcherite' Sir Leon Brittan (1989–1995), continued with Karel van Miert (1995–1999), Mario Monti (1999–2004), and Neelie Kroes (2004–2009). These Commissioners received support from, and held close ties with, European capital actors, most notably from the ERT. Sutherland (who himself became an ERT member in 1997 as Chairman of BP) and Brittan held several meetings with ERT members, who considered the Commission and its DG Competition to be 'extremely open to the business community' (Janssen, 2000).

As part of the broader neoliberal turn and its consolidation, the content, form, and scope of European competition policy was significantly transformed. Regarding *content*, a 'competition only' vision became dominant, giving primacy to efficiency criteria in judging economic transactions in the enforcement of EC competition policy. This breaks with the broader understanding of competition as a phenomenon with both positive and negative effects, and the underpinning macroeconomic, industrial, and social policy goals. The Commission imposed rationalization programs on crisis-ridden sectors, meant to heal the economy and induce radical industrial restructuring by 1985 (cf. Commission, 1982). Under the leadership of Sutherland as the new Competition Commissioner in 1985, it aggressively challenged national governments for acts of state aid before the European Courts (Commission, 1988: 15). By fighting state aid, the leeway of national industrial policies, one the core features of embedded liberalism, significantly narrowed. Sutherland fully realized that this was 'as close as you can get to touch the nerve of national sovereignty' (*The Financial Times*, 1987: 18).

From the 1990s onwards, the Commission, in alliance with transnational capital actors, pushed for the privatization of public utility and infrastructure sectors that previously, for reasons of public interests, were exempted from competition regulations, such as telecommunications, energy, postal services, and transport. Capital actors represented in the ERT disparaged the allegedly high-cost, inefficient, bureaucratic, and highly overstaffed public monopolies (*The Financial Times*, 1996: 16). Next to offering prospects of corporate expansion in new lucrative sectors, privatization was believed to create more efficient and cheaper goods and services. In response, the DG Competition endorsed so-called privatization directives under Article 90(3), a hitherto virtually unused provision, allowing it to issue directives in the field of public enterprises and monopolies without the approval of the Council. Privatization received every emphasis when the Commission took over the role of guiding the Central and Eastern European Countries through the transition to free-market capitalism in the 1990s. Alongside the institution of market freedom and ownership rights, it promoted competition policy as a key instrument for introducing the logic of open competition to previously government-controlled economies, where monopolies and centralized price-fixing constituted the norm (Commission, 1995).

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As part of the broader neoliberal market restructuring at EC level, also cartels were prosecuted with an unprecedented stringency since the mid-1980, marking a sharp contrast with the previous lenient stance. The fight against privately erected market barriers was meant to establish the notion of free competition. As a general deterrent, the magnitude of cartel fines reached ever new heights (McGowan, 2007: 6). To disclose more cartels, the Commission issued a Leniency Notice in 1996 (revised in 2002 and 2006) similar to US practices, which, based on game theoretical assumptions and the logics of the prisoners' dilemma, granted immunity from prosecution to those 'carteleers' confessing first to have participated in a collusive agreement.

The gradual 'neoliberalization' of EC competition policy was not uncontested, which was due to incompatible policy-area-specific discourses of regulation. This revealed particularly in the difficulties of member states to reach an agreement on delegating new powers to the Commission for M&As meeting a certain turnover threshold in the 1980s. A bone of contention was the desired form and content of an EC Merger Control Regulation (MCR), most notably, whether (democratically accountable) member state governments could overrule the (not democratically accountable) Commission's decisions in certain merger cases. In the MCR that was eventually adopted in 1989, member states were granted merely a non-binding advisory role in the Advisory Committee. Similarly, suggestions to include employment and industrial policy criteria were blocked. Commissioner Brittan (2000: 3) later commented that '(i)n the end, the supporters of an industrial policy were effectively beaten back' and that the MCR gave 'clear primacy to the competition criterion, with only the smallest nod in the direction of anything else'. In other words, the neoliberal policy-area-specific discourse prevailed.

The reason why an agreement on the neoliberal content of the new regulation could be reached was because capital actors from the ERT, UNICE, and other business groups urged the member states to do so (Commission, 1988: 25). The issue of a pan-European merger regulation stood high on the corporate agenda. In response to the 1992 Program, and the ongoing deregulation and liberalization more generally, the number of cross-border M&As significantly increased after the mid-1980s. Numerous ERT companies, including Nestlé, BAT Industries, Unilever, Phillips, Daimler-Benz, and Fiat were actively involved in M&As in this period (Gray and McDermott, 1989: 10–6). The Commission could convince capital actors that the MCR was designed to facilitate acts of concentration, rather than prohibit them. The inclusion of strict timetables, and a one-stop-shop rule for the decision-making, implying that once the Commission opened up a case, NCAs could not intervene anymore, was very much welcomed by transnational capital. It eliminated the transaction costs resulting from

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multiple national regulatory overlaps, and created the much desired legal certainty for mergers.

In the wake of the Lisbon Strategy, capital actors called for reforming the EC competition regime, arguing that the Lisbon strategy 'cannot be pursued, let alone realized, unless competition has space to flourish' (ERT, 2000: 1). These calls were successful. As part of a 'moment of consolidation', the EC competition regime underwent a far-reaching reform in 2004. What officially was titled the 'modernization', further institutionalized neoliberal practices, and consolidated a more marked-based competition regime. Efficiency gains were established as the hallmark for decision-making, supported by a growing number of economists in the DG Competition trained in microeconomic reasoning when assessing anticompetitive conduct (Wigger and Nölke, 2007: 499). As part of the project of basing competition regulation on 'sound' microeconomics, the test for vetting mergers was rephrased along the lines of the US test. As such, the reform entailed what Commissioner Monti (2001) called 'a silent process of convergence towards US competition law and practices'.

It remains to be seen what the long-term effects of this will be. So far, it seems that the Commission will be banning an even smaller number of mergers. From 2004 to June 2008, only two out of the 1466 notified mergers were prohibited (Commission, 2008). At the heart of this neoliberal type of competition policy lays an important contradiction: on the one hand, competition is celebrated as a 'highest good', requiring the rigorous prosecution of cartels and state aid, as well as privatization. On the other hand, the Commission is extremely reluctant to prevent massive concentrations of capital, hereby potentially allowing for competition to be undermined. In contrast to the embedded liberalism era, where the facilitation of economic concentration was characterized by an active interventionist stance, and informed by social and industrial policy goals, under neoliberalism, the regulation of M&As somewhat paradoxically is passive, yet, still permissive, justified by a 'competition only' approach and expected efficiency gains and consumer welfare maximalization as the central decisional criteria. The main beneficiaries of the neoliberal type of competition policy are TNCs, seeking to further strengthen their market position and gain market access through M&As. Less competitive and/or smaller companies, in contrast, are prevented from engaging in cartels and/or from receiving state subsidies.

Regarding *form*, European competition regulation became less democratic and more privatized. At national level, the replacement of the French *Commission de la Concurrence* by the *Conseil de la Concurrence* in 1986 was significant as the *Conseil* substituted 'judicial oversight over interpretation and enforcement for political discretion' (Souam, 1998: 209). From the 1980s onwards, the German Minister of Economics increasingly refrained from overruling the decisions of the politically independent *Bundeskartellamt*,

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and the British 2002 *Enterprise Act* limited political involvement in the regulation of mergers (Scott *et al.*, 2006: 8). At EC level, the 2004 reform abolished the administrative *ex ante* notification regime in the area of cartels and restrictive business practices by replacing Regulation 17 with Regulation 1/2003. With the Commission's retrenchment from its longstanding public market supervisory role, the more market-driven practice of private enforcement made its inroads, which increasingly relies on the proactivity of market actors to litigate anticompetitive conduct (cf. Wigger and Nölke, 2007).

Private enforcement constitutes an artifact of the various forms of corporate self-regulation promoted within neoliberalism. The modernization reinforces private litigation not only at EC level, but renders competition regimes all over Europe more litigation-based and market-driven, because it subordinates NCAs to the DG Competition. Formally speaking, EC competition regulations were 'decentralized' by involving NCAs into the enforcement of EC competition rules. Yet, the establishment of the European Competition Network (ECN) in 2002, as a key-supporting forum for NCAs and courts, enacted a further *centralization* of powers in which the Commission reserved far-reaching supervisory powers for itself regarding the coordination of the investigations and the warranty of legal consistency in the application of competition rules (ibid). Rather than being a network of equals, the Commission can intervene and withdraw proceedings in the case of conflicting decisions, which are decisions running counter to its own. By obliging NCAs to report the opening of every new case, the Commission can not only comment on national procedures, but also trespass, and, thus bypass them. As Wilks (2005: 438) rightly explained, the Commission 'engineered an audacious coup' in further extending its powers by marginalizing national competition laws, and corralling NCAs.

Regarding *scope*, the neoliberal discourse proclaimed to supplement, or, preferably, to replace national competition policies with regional and global forms of regulation. The establishment of the ECN aimed at enhancing Europeanization in the form of an EU-wide convergence of competition laws with one common reference point, namely that of the Commission and the jurisprudence of the courts. Attempts to achieve enhanced convergence can also be observed on a global scale. Corresponding with the interests of transnational capital to further remove market barriers, the Commission emerged as a vanguard in orchestrating a multilateral competition agreement in the regulatory realm of the World Trade Organization (WTO). The impetus directly stemmed from transnational elite networks, such as the ERT and TABD, who actively encouraged the EU and US competition authorities to establish global competition rules (TABD, 1995; Commission, 1996; ERT, 1996). The worldwide proliferation of competition regimes in the 1990s fuelled corporate concerns that competition rules would be interpreted in a protectionist manner, and be biased against

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Table 2 Competition policy in the era of neoliberalism

	Neoliberalism
Content	• Prevalence of a narrow 'competition only' focus (efficiency and consumer welfare considerations) • Stringent prosecution of cartels and state aids • Privatization of public enterprises • Passive facilitation of cross-border M&As (through the centralization/coordination of regulatory powers) • Focus on eliminating global market barriers
Form	• Reduced influence of political decision-makers on the regulatory practices of competition authorities • Decision-making based on 'sound' microeconomics • Retrenchment of public market supervision • Increased levels of private enforcement
Scope	• Independent role of NCAs significantly reduced • Transnationalization of competition regulation

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foreign competitors. A WTO competition agreement would have committed member governments to ensure free access to foreign capital actors to new product, public procurement, and labor markets, as well as markets for natural resources, services, and investment. Moreover, common competition standards would have significantly reduced transaction costs for TNCs confronted with the problematic of multi-jurisdictional overlap, i.e. the necessity to comply with multiple NCAs. Yet, due to the opposition of the US and a range of developing countries, binding WTO competition rules did not achieve political momentum. Instead, the US and EU competition authorities, with the strong support of transnational business interests, established in 2001 the International Competition Network (ICN) as the prime mechanism to proclaim global convergence in competition matters (ICN, 2005). The ICN's informal and non-binding 'best practices' machinery allows capital actors to play an important role side-by-side with the dominant competition authorities in removing obstacles to the free flow of market forces in the accumulation of capital.

As argued above the content, scope and form of contemporary European competition regulation is in essence neoliberal (see Table 2). It remains to be seen whether the current financial crisis signals the end of the neoliberal era in the field of competition regulation. Our prediction is that a paradigm shift is not at hand. So far, political responses to the financial crisis reflect a 'relative continuity' of the neoliberal path, rather than discontinuity. The governmental bail outs/'semi-nationalization' and rescue strategies of banks and financial institutions are not accompanied by substantial conditions and/or subjected to democratic control (yet), and the (temporary) toleration of state aid is justified along neoliberal lines: saving

an independent financial system as a key component of a capitalist system, and hence, the current pattern of capital accumulation. It seems that neoliberal ideas are deeply institutionalized and continue to enjoy support from a wide range of powerful socioeconomic forces, and, hence, that the hegemony of neoliberalism both as a general and as a policy-area-specific discourse is not about to crumble.

CONCLUSIONS

This article demonstrated that since the mid-1980s, a major transformation of the content, form and scope of European competition policy has taken place, which is related to the transnationalization of capitalism, and the broader shift from embedded liberalism towards neoliberalism. Regarding *content*, in the era of embedded liberalism, competition was generally regulated on the basis of various 'public interest' criteria (including employment considerations), and displayed clear traces of a protectionist and neomercantilist ideology, aiming at sheltering certain industries and companies from fierce outside competition. Although competition policy was genuinely market opening, and thus, market-making in character, it also entailed a rather tolerant stance towards M&As and various (cross-border) intercompany agreements. The neoliberal type of competition regulation, in contrast, based on a 'competition only' vision, gives primacy to the efficiency criteria in judging economic transactions. The Commission aggressively targeted state aid and cartels, and pushed for further privatization, while vetting economic concentrations without considering their social effects.

Regarding *form*, the influence of democratically accountable national decision-makers was significantly reduced. The use of sophisticated microeconomic modeling in the assessment of anticompetitive conduct, and the increased privatization of its enforcement have become the standard. This shift, which was consolidated with the 2004 overhaul, entails a major step of convergence to the more market-based competition regime of the US, a development European citizens cannot influence through democratic channels. Regarding *scope*, an increased Europeanization and globalization of competition regulation can be witnessed. Whereas NCAs previously enjoyed a certain degree of autonomy under embedded liberalism, the structural integration of national jurisdictions into the ECN, as a larger EU level framework, significantly minimized their independent role. The attempts to conclude a multilateral WTO competition agreement, and the subsequent establishment of the ICN, demonstrate that the amalgamation of neoliberalism and the promotion of competition policy in European integration is constituent to the worldwide spread of neoliberal ideas.

These changes have wide-ranging consequences. The current type of EC competition regulation serves to strengthen the power of TNCs also

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on a global scale. The dynamics of unbridled competition constitute the very mechanism perpetuating material inequality, thwarting the existence of comparatively weaker (and usually smaller) competitors. By seeking to stabilize the competitive process, competition laws inherently secure the continuous reproduction of capitalist socioeconomic power relations, also between the developed and the developing world. Competition erects a hierarchy marked by inequalities in social wealth that extend from the individual, to groups or classes, to geographical regions in the world. Scholars in the field of competition policy should not take the desirability of the neoliberal type of competition regulation for granted, but pay more attention to the crucial ramifications of the competitive dynamics on the overall structure of the global political economy, particularly regarding the prospects for economic development of structurally disadvantaged parts of the world.

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